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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 464

O. C. WILEY & SONS, INCORPORATED,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

JURISDICTIONAL STATEMENT

This suit was filed by O. C. Wiley & Sons, Incorporated, on November 4, 1948, in the United States District Court for the Western District of Virginia, against the United States of America. The purpose of this suit was to have a special court of three judges to hear our petition about the Interstate Commerce Commission permitting Stuart Lumber Corporation to sell to John C. Fleming, Jr., operating rights that Stuart Lumber Corporation had previously contracted by a valid contract to sell to O. C. Wiley & Sons, Incorporated, and then to set aside, annul and forever

enjoin the Interstate Commerce Commission from permitting Stuart Lumber Corporation from selling to John C. Fleming, Jr., operating rights that Stuart Lumber Corporation had contracted by a valid contract to sell to O. C. Wiley & Sons, Incorporated, which transfer of operating rights was allowed by the provisions of the report and order dated June 18, 1948, entered in a proceeding before the Commission, known as Docket No. MC-3774, John C. Fleming, Jr.—Purchase—Stuart Lumber Corporation. The reasons why the report and order should be set aside, annulled and the permissive authority therein granted forever withdrawn, among others, are that the Commission did not leave the question of the contract between Wiley and Stuart for settlement by the courts because the Commission did, before the State Court could pass upon the validity of the contract between Wiley and Stuart, authorize Stuart Lumber Corporation to sell to John C. Fleming, Jr., the operating rights Stuart had (by a valid contract) contracted to sell to O. C. Wiley & Sons, Incorporated, and, had the Commission not considered or approved the application of Stuart and Fleming prior to the judgment of the State Court on the question of the contract between Stuart and Wiley, this proceeding would have never been necessary, because the State Court found that a valid contract of purchase was made between Wiley and Stuart. Consequently, Wiley could have, no doubt, required specific performance in the State Courts had it not been for the action of the Commission in this proceeding; that the action of the Commission in opposing this suit and approving the application of Stuart and Fleming, in the premises, is an unjustifiable interference with the property rights of O. C. Wiley & Sons, Incorporated, and amounts to the taking of property without due process of law; that the Commission cannot be heard to say that its action in the premises is proper, since the State Court has found that Stuart and Wiley made a valid

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contract and that court action of Wiley was taken in compliance with what the Commission has said about the enforcement of contracts as follows: "All matters involving the interpretation of contracts and the enforcement of the terms thereof must be left for settlement between the parties themselves or by the courts"; that the Commission, since it has control over these operating rights, should never permit a holder of those rights to use the Commission for the purpose of inflicting damage upon another for the gain of the owner of the operating rights; that the Commission, when it receives notice that the owner of operating rights has sold the same operating rights to two parties, should refuse to act in the premises until the Court has determined the rights of the parties, thus preventing an owner of such rights from inflicting injury and damage; and that the Commission should not aid or hinder either party or do any act that will prejudice or prefer either party.

The jurisdiction of the three-judge District Court rests upon the provisions of the Acts of Congress approved June 25, 1948 (c. 646, 62 Stat. 869) Sections 2284 and 2325, Title 29, United States Code, Judiciary and Judicial Procedure.

The decision of the Interstate Commerce Commission here considered, is a decision of the kind that is to be heard and determined by a district court of three judges. Consequently, the decision of the court in this proceeding is the kind of a decision from which an appeal to the Supreme Court is allowed by Section 1253, Title 28, United States Code, "Judiciary and Judicial Procedure". The jurisdiction of the Supreme Court of the United States over this suit on appeal is allowed by Section 1253, Title 28, United States Code, as that section provides:

> "Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocu-

tory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

This is a suit that must be heard and determined by a district court of three judges, as Section 2325, Title 28, United States Code, provides as follows:

"An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title."

Then, Section 2101, Title 28, United States Code, provides, in part, as follows:

"(a) A direct appeal to the Supreme Court from any decision under sections 1252, 1253, and 2282 of this title, holding unconstitutional in whole or in part, any act of Congress, shall be taken within thirty days after the entry of the interlocutory or final order, judgment or decree. * * *

"(b) Any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in any civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree appealed from, if interlocutory, and within sixty days if final."

The decision and order appealed from were rendered and entered on the 3rd day of September, 1949, and the petition for leave to take an appeal, with assignment of errors, was filed on the 1st day of November, 1949, or filed within the sixty day period allowed by Section 2101(b), Title 28, United States Code.

The District Court, we believe, erred as a matter of law, in refusing to grant the prayer of plaintiff for an order

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annulling, setting aside and forever enjoining the report and order of the Interstate Commerce Commission, dated June 18, 1948, on the ground that said order, as plaintiff alleges, is unlawful and contrary to the Interstate Commerce Act (49 U. S. C. A).

The decision of this Court in this proceeding should be reviewed by the Supreme Court of the United States and this Honorable Court decree whether or not the Commission can or should permit or authorize an owner of operating rights to transfer those operating rights to one party, when as here, the owner has contracted to sell the same operating rights to two parties and whether or not an owner of operating rights is a common carrier, within the provisions of Sections 5(2) (a) (49 U. S. C. A. 5(2) (a)) so as to permit the Commission to approve the transfer of the operating rights to one of the two parties to the injury and damage of the other one of the two parties and this proceeding should be reviewed for the purpose of determining whether or not the Commission can act so as to take the property of another without due process of law.

The decision appealed from is contrary to law, as it sustains the proposition that the Commission can use its power so as to permit the owner of operating rights to contract to sell the same operating rights to two parties and then use the office of the Commission for the purpose of selecting and completing the sale to one party to the detriment of the other party.

The decision appealed from is contrary to law, as it sustains the proposition that the Commission need not wait before approving the sale and transfer of operating rights until the rights of the parties have been determined by the Courts in instances where, as here, the owner has contracted to sell the same operating rights to two parties.

The decision appealed from is contrary to law, as the record shows that Stuart made a valid contract with Wiley

to sell the considered operating rights to Wiley, and since operating rights are unique and those rights are within the complete control of the Commission, the action of the Court in not recognizing the contract was error and the Supreme Court should review this proceeding on that ground, as well as on the other grounds.

The questions involved in this proceeding are all substantial. One of the questions involves the right of the Commission to take away the property of one party without due process of law, which has been done to O. C. Wiley & Sons, as the rights Wiley contracted to purchase were given to Fleming.

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APPENDIX

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF VIRGINIA, LYNCHBURG DIVISION

Civil Action No. 198

O. C. WILEY & SONS, INCORPORATED, *Plaintiff*,

vs.

UNITED STATES OF AMERICA, *Defendant*,

and

INTERSTATE COMMERCE COMMISSION, *Intervening Defendant*

(Argued August 30, 1949. Decided Sep. 3, 1949)

Before DOBIE, Circuit Judge, and PAUL and BARKSDALE, District Judges

W. G. Burnette, Esq., Lynchburg, Va., attorney for plaintiff, Herbert A. Bergson, Esq., Assistant Attorney General, William D. McFarlane, Special Assistant to the Attorney General, James Kilday, Special Assistant to the Attorney General, Edward Dumbauld, Esq., Special Assistant to the Attorney General, of Washington, D. C., and Howard C. Gilmer, Jr., Esq., United States Attorney, Roanoke, Va., counsel for the United States.

D. W. Knowlton, Esq., and Samuel R. Howell, Esq., attorneys for the Interstate Commerce Commission.

DOBIE, *Circuit Judge:*

Stuart Lumber Corporation (hereinafter called Stuart) entered into a contract with O. C. Wiley & Sons, Incorporated, (hereinafter called Wiley) under which, for a consideration of $1,000.00, Stuart agreed to transfer to Wiley certain operating rights which Stuart, as a motor carrier, had under a certificate of the Interstate Commerce Commis-

sion (hereinafter called the Commission). Later, in spite of this contract, Stuart, apparently for a larger consideration than that specified in the Stuart-Wiley contract, agreed to transfer these same operating rights to John C. Fleming, Jr., (hereinafter called Fleming.)

Upon an application filed with the Commission by Stuart and Fleming, the Commission (Docket MC—3774, John C. Fleming, Jr.—Purchase—Stuart Lumber Corporation) entered an order on June 18, 1948, permitting Stuart to sell and Fleming to buy these operating rights hitherto possessed by Stuart. Before the entry of this order, Wiley had (in writing to the Commission) protested its issuance on the ground of its contract with Stuart, which was prior to Stuart's contract with Fleming. The Commission, however, delayed final and definitive action until Wiley could establish, in a court of the State of Virginia, such rights, if any, that he might have against Stuart in the premises. Final action was also delayed by the Commission in order that our Court might pass on the instant civil action, instituted in the District Court of the United States for the Western District of Virginia, asking us to annul, set aside or suspend the order of the Commission authorizing the transfer by Stuart of its operating rights to Fleming.

Wiley, accordingly, filed a suit in the Circuit Court of the City of Lynchburg, Virginia, against Stuart asking for specific performance by Stuart of its contract to transfer to Wiley the operating rights of Stuart. Under the utterly antiquated and absolute outsworn practice in the states courts of Virginia (to which Virginia lawyers so dearly and so lovingly cling) there is a clear separation of law and equity. The Virginia court held that it could not decree specific performance here and transferred the case to the law side of the court. It there proceeded as an action at law for damages arising from a breach of contract. And, in accordance with a verdict of the jury, which fixed these damages at $300.00, a money judgment for that amount was entered by the Virginia court in favor of Wiley and against Stuart.

We append certain opposite provisions of the Federal Interstate Commerce Act.

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Section 5 (2) reads (in part) as follows:

"(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) * * * for any carrier, or two or more carriers jointly, *to purchase,* lease, or contract, to operate the properties, or any part thereof, of another; * * *

(b) Whenever a transaction is proposed under subparagraph (a), *the carrier or carriers or person seeking authority therefor shall present an application to the Commission,* and thereupon the Commission * * * shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the finding specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. *If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of sub-paragraph (a) and will be consistent with the public interest it shall enter an order approving and authoriznig such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable."* (Italics supplied.)

Section 5(4) provides:

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of sub-paragraph (a) * * *."

Section 5(11) provides:

"The authority conferred by this section shall be exclusive and plenary, * * *.

Wiley contends that the Commission should not have entered the order in question approving the transfer by Stuart of its operating rights to Fleming until a determina-

tion of the rights, if any, of Wiley under the contract between Wiley and Stuart. The Commission has repeatedly held that its orders approving such transfers are permissive only, that the Commission is not a court and must leave to the courts the determination of such alleged conflicting rights between the parties, and that the Commission will not, upon the mere assertion of an adverse claim, hold up indefinitely its decision on such applications—a procedure which would, in many cases, result in almost an interminable delay. See, Raymond Bros. Motor Transportation, Inc.—Purchase—Borzel, 15 M. C. C. 477; Harris Bros. Transfer Co.—Purchase—Glosson—Hancock, 25 M. C. C. 645; Marion Trucking Co.—Purchase—Harwood Trucking, 45 M. C. C. 377.

The great weight to be attributed to the Commission's interpretation of Section 5(2) of the Interstate Commerce Act has frequently been attested by the Supreme Court. See, United States *v.* American Trucking Associations, 310 U. S. 534, Colgate-Palmolive-Peet Co. *v.* United States, 320 U. S. 422, 426; United States *v.* Jackson, 280 U. S. 183, 193; New York Central Securities Corp. *v.* United States, 287 U. S. 12, 27; McLean Trucking Co. *v.* United States, 321 U. S. 67, 87-89.

Wiley strongly contends that the Commission should not, and could not, approve the transfer by Stuart to Fleming of the Stuart operating rights because, at the time of this transfer, these rights were owned by Wiley and not by Stuart. There are two obvious answers to this contention. The Stuart-Wiley contract in terms was not even an attempted executed transfer of the Stuart rights to Wiley; it was, at best, no more than an executory contract providing that Stuart would transfer (which it never did) these rights to Wiley in the future. And no transfer by Stuart to Wiley of these rights could be effective (under the provisions of the Interstate Commerce Act cited above) without the permission of the Commission.

It is not for us to speculate on the correctness (or lack of it) of the decision of the Virginia court in the suit brought therein by Wiley against Stuart. For our purposes, that decision is *res adjudicata* in its determination that Wiley was not entitled to specific performance by Stuart of the

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Stuart-Wiley contract. And, when Wiley permitted this case to proceed as an action at law, resulting in a mere judgment for money damages for a breach of this contract by Stuart, without any appeal by Wiley, all of Wiley's rights under this contract became merged in the judgment. It is thus at least open to serious question whether our setting aside of the Commission's order that is before us would in any way be helpful to Wiley.

It must be remembered that Wiley filed no application with the Commission as required by Section 5 (2) (b) of the Interstate Commerce Act, and made no allegations either before the Commission or in this Court that the action of the Commission in approving the transfer: (1) was not in the public interest; (2) was not within the scope of Section 5 (2); and (3) the terms and conditions of the purchase were unjust and unreasonable as between the parties. It has been often recognized that Section 5 confers broader authority and greater administrative discretion than most any other section of the Act and that the legislative history of the recent amendments to this section of the Act show congressional intent to broaden the authority of the Commission. We are, accordingly, of the opinion that the Commission's report and order, approving the transfer upon terms and conditions found to be just and reasonable and consistent with the public interest, should not be set aside.

The primary concern of the Commission here is the protection of the public interest. It has been repeatedly held that a very strong showing must be made (and here there is no such showing) by one who seeks to set aside an order of the Commission in this field. See, McLean Trucking Co. v. United States, 321 U. S. 67, 87-89; Texas v. United States, 292 U. S. 522, 531; Interstate Commerce Commission v. Union Pacific R. R., 222 U. S. 541, 547-549; Alton Railroad Co. v. United States 315 U. S. 15, 23; Virginia Stage Lines v. United States, 48 F. Supp. 79; General Transportation Co. v. United States, 65 F. Supp. 981, affirmed 329 U. S. 668.

Wiley complains further that the Commission refused to hold a public hearing and denied Wiley's request for a further consideration or rehearing in this case. These are matters primarily vested in the sound discretion of the Com-

mission. And no adequate showing has been made that would justify us in interfering with the exercise by the Commission of this discretion in these matters.

For the reasons above set out in this opinion, we must decline to set aside, annul or suspend the instant order of the Commission, and the civil action of the plaintiff herein must be dismissed.

Dismissed.

I concur in the foregoing opinion.

JOHN PAUL,
Dist. Judge.

I dissent.

A. D. BARKSDALE,
U. S. District Judge.

Endorsed: Filed Sep. 3, 1949. G. E. Gentry, Clerk, by Louis H. Price, Deputy.

A Copy. Teste:

(S.) LOUIS H. PRICE,
Deputy Clerk.

(SEAL.)

AT A REGULAR TERM OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT LYNCHBURG, ON THE 3 DAY OF SEPTEMBER, 1949

Civil Action No. 198

O. C. WILEY & SONS, INCORPORATED, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant, and INTERSTATE COMMERCE COMMISSION, Intervening Defendant

ORDER

This action having been considered upon the complaint and answers of the defendants, and the amended complaint and answer thereto, and upon the exhibits submitted, and

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upon the arguments of counsel for all the parties heard herein on August 30, 1949;

And it being the opinion of the court, for reasons which have been stated in the opinion filed this day herein, that the prayers of said complaint and amended complaint to set aside and annual an order of the Interstate Commerce Commission dated June 18, 1948, in Docket MC-3774, John C. Fleming, Jr.—Purchase—Stuart Lumber Corporation, and a report of the Commission entered on the same day, are without merit:

Now, therefore, it is Ordered that the prayers of said complaint and amended complaint be, and they hereby are, denied, and that this action be, and the same is, hereby dismissed at the costs of the plaintiff:

To which action of the court in dismissing said action, the plaintiff, by counsel, duly objected and excepted for reasons fully stated to the court.

And the Clerk of this court shall certify and mail copies hereof, together with a copy of the court's opinion, to all counsel of record herein.

Enter:

(Signed) ARMISTEAD M. DOBIE,
United States Circuit Judge.
(Signed) JOHN PAUL,
United States District Judge.
(Signed) A. D. BARKSDALE,
United States District Judge.

A copy. Teste:

(Signed) LOUIS H. PRICE,
Deputy Clerk.

(SEAL.)